

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned On Briefs May 10, 2006

**BRENDA KAY EAGLE v . STATE OF TENNESSEE**

**Appeal from the Circuit Court for Warren County**  
**No. F-9534    Larry B. Stanley, Jr., Judge**

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**No. M2005-01777-CCA-R3-CD - Filed July 6, 2006**

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The appellant, Brenda Kay Eagle, was indicted in 2003 with manufacturing methamphetamine, manufacturing marijuana and possession of methamphetamine. The appellant entered a nolo contendere plea to manufacturing methamphetamine in return for the dismissal of the remaining charges. After a sentencing hearing, the trial court sentenced the appellant to a three-year sentence, ordering her to serve one hundred days of the sentence in the county jail and the remainder of the sentence on probation. The appellant filed a timely notice of appeal, challenging the trial court's sentencing determination. Because the trial court properly sentenced the appellant, we affirm the judgment of the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court is Affirmed.**

JERRY L. SMITH, J., delivered the opinion of the court, in which GARY R. WADE, P.J., and ALAN E. GLENN, J., joined.

John H. Norton, III, Shelbyville, Tennessee, for the appellant, Brenda Kay Eagle.

Paul G. Summers, Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; Dale Potter, District Attorney General; and Tom Miner, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

In December of 2003, the appellant was indicted by the Warren County Grand Jury on charges of manufacturing methamphetamine, manufacturing marijuana and possession of methamphetamine. On February 18, 2005, the appellant entered a nolo contendere plea to manufacturing methamphetamine. The transcript of the guilty plea hearing is not a part of the record

on appeal, but the facts giving rise to the indictment and guilty plea appear in part in the presentence report. Apparently, on May 9, 2003, authorities discovered items used in the manufacture of methamphetamine in the trash at the appellant's home. The appellant shared the home with at least one other person. A search warrant was obtained for the residence. Upon execution of the warrant, various items associated with manufacturing methamphetamine were discovered. The appellant was also in possession of methamphetamine in her cigarette case. Further, there was marijuana found in the residence.

In exchange for the nolo contendere plea to manufacturing methamphetamine, the remaining charges were dismissed. The plea agreement did not specify a sentence so the trial court held a sentencing hearing.

At the hearing, Jerry Johns, a probation officer, testified. Mr. Johns interviewed the appellant as part of the preparation of the presentence report. According to Mr. Johns, the appellant indicated that she began using methamphetamine roughly twelve years ago and had last used it on February 14, 2005. Mr. Johns testified that he supervised multiple offenders in his jurisdiction with methamphetamine charges and addictions. Mr. Johns stated that in his experience as a probation officer, he found that offenders with methamphetamine offenses had a higher recidivism rate than other offenders.

The appellant also took the stand. Contrary to Mr. Johns's assertions, the appellant testified that she had not used methamphetamine since her arrest in May of 2003. The appellant explained that she used marijuana on February 14, 2005, but not methamphetamine. The appellant stated that she had no actual role in the manufacture of the methamphetamine in her residence, but that she had turned a blind eye to her boyfriend's production of the drug.

The appellant further testified that she had worked at three different factory jobs since her arrest. At the time of the hearing, the appellant was attending school to obtain her real estate license. The appellant requested judicial diversion, so that she would eventually be able to take the real estate exam and obtain her license. The appellant admitted that she used methamphetamine, but did not characterize herself as a strong user of the drug. On cross-examination, the appellant claimed that she would pass a drug test given to her at the sentencing hearing. The appellant then submitted to a test, which field tested positive for marijuana.<sup>1</sup> The trial court ultimately sentenced the appellant to three years in incarceration. The trial court ordered the appellant to serve one hundred days of the sentence in confinement in the county jail and the balance of the sentence on probation.

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<sup>1</sup>The appellant requested further laboratory testing, which the trial court agreed to accommodate, postponing the remainder of the hearing until the laboratory results were obtained. The laboratory testing did not reveal the presence of any drugs in the appellant's system.

### Analysis

On appeal, the appellant argues that the trial court erred in denying her request for judicial diversion and probation. The State contends that the trial court acted “within its discretion” in denying judicial diversion and properly refused to grant the appellant a sentence of full probation.

“When reviewing sentencing issues . . . , the appellate court shall conduct a de novo review on the record of such issues. Such review shall be conducted with a presumption that the determinations made by the court from which the appeal is taken are correct.” Tenn. Code Ann. § 40-35-401(d). “However, the presumption of correctness which accompanies the trial court’s action is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances.” State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). In conducting our review, we must consider the defendant’s potential for rehabilitation, the trial and sentencing hearing evidence, the pre-sentence report, the sentencing principles, sentencing alternative arguments, the nature and character of the offense, the enhancing and mitigating factors, and the defendant’s statements. Tenn. Code Ann. §§ 40-35-103(5) & -210(b); Ashby, 823 S.W.2d at 169. We are to also recognize that the defendant bears “the burden of demonstrating that the sentence is improper.” Ashby, 823 S.W.2d at 169.

According to Tennessee Code Annotated section 40-35-313, commonly referred to as “judicial diversion,” the trial court may, at its discretion, following a determination of guilt, defer further proceedings and place a qualified defendant on probation without entering a judgment of guilt. Tenn. Code Ann. § 40-35-313(a)(1)(A). A qualified defendant is one who:

- (a) Is found guilty of or pleads guilty or nolo contendere to the offense for which deferral of further proceedings is sought;
- (b) Is not seeking deferral of further proceedings for a sexual offense or a Class A or Class B felony; and
- (c) Has not previously been convicted of a felony or a Class A misdemeanor.

Tenn. Code Ann. § 40-35-313(a)(1)(B)(i)(a), (b), & (c). When a defendant contends that the trial court committed error in refusing to grant judicial diversion, we must determine whether the trial court abused its discretion by denying the defendant’s request for judicial diversion. State v. Cutshaw, 967 S.W.2d 332, 344 (Tenn. Crim. App. 1997). Judicial diversion is similar to pretrial diversion. However, judicial diversion follows a determination of guilt, and the decision to grant judicial diversion is initiated by the trial court, not the prosecutor. State v. Anderson, 857 S.W.2d 571, 572 (Tenn. Crim. App. 1992). When a defendant challenges the trial court’s denial of judicial diversion, we may not revisit the issue if the record contains any substantial evidence supporting the trial court’s decision. Cutshaw, 967 S.W.2d at 344; State v. Parker, 932 S.W.2d 945, 958 (Tenn. Crim. App. 1996).

The criteria that the trial court must consider in determining whether a qualified defendant should be granted judicial diversion include the following: (1) the defendant’s amenability to

correction; (2) the circumstances of the offense; (3) the defendant's criminal record; (4) the defendant's social history; (5) the defendant's physical and mental health; and (6) the deterrence value to the defendant and others. Cutshaw, 967 S.W.2d at 343-44; Parker, 932 S.W.2d at 958. An additional consideration is whether judicial diversion will serve the ends of justice, i.e., the interests of the public as well as the defendant. Cutshaw, 967 S.W.2d at 344; Parker, 932 S.W.2d at 958; State v. Bonestel, 871 S.W.2d 163, 168 (Tenn. Crim. App. 1993), overruled on other grounds by State v. Hooper, 29 S.W.3d 1, 9 (Tenn. 2000).

At the sentencing hearing, the trial court specifically stated that it considered:

[T]he pre-sentence report, the defendant's prior history, criminal history, social history, and things of that nature[,] [t]he particular offense here, the facts and circumstances surrounding what was going on at [the appellant's] home, the items that were found, criminal conduct involved in the offense, whether or not the defendant might be reasonably expected to be rehabilitated, and her potential for rehabilitation . . . . I have also considered whether it appears that [the] defendant in this case, . . . would abide by the terms of probation, and whether she would be able to complete that. Whether or not the interest of society would be protected from possible future criminal conduct by incarcerating this lady for at least some period of time, or whether full probation would be warranted. Whether or not a sentence of full probation would unduly depreciate the seriousness of the offense. Whether confinement in this particular crime is well suited to provide an effective deterrent to others who have been or will engage in this type of conduct. I have also considered [trial counsel's] statements regarding this lady's schooling for real estate classes, and getting her diploma from that, and being eligible to take the real estate board license exam. . . . It is not my intention to deprive anyone who wants to make a living or to better themselves from doing that. I have had the situation come up before where someone has asked for judicial diversion after committing a crime, and has asked the Court to grant judicial diversion so that the party will not have a felony on their record after completing the term of the diversion, or whether they would be allowed, as in this case, to take the real estate exam, and would not be able to if the felony was on their record. That thought carries some weight, but it does not carry enough weight with me to allow them to escape their responsibility to commit an offense such as this and simply have it go away after a period of time. . . . Of course, she knew that she was facing and, I guess, had plead guilty to a C felony offense before she ever completed this course, knowing that more than likely she would be ineligible to take the exam having a felony on her record. I think that [the appellant] is an intelligent lady. I think that she knew what she was doing during the term of the commission of this offense. I think that she will be able to get other employment. I am sorry, but I am not going to grant you judicial diversion.

The appellant complains that the trial court erred in denying judicial diversion. Specifically, the appellant argues that the factors the trial court should have considered weighed in favor of the

grant of judicial diversion and that the trial court “did not demonstrate that he had weighed and properly considered all of the critical factors in reaching his decision.” Further, the appellant argues that the trial court incorrectly placed primary emphasis on the fact that methamphetamine use and possession are significant problems in Warren County.

In denying judicial diversion, the trial court stated that it considered the relevant factors and pointed out that overcoming a methamphetamine addiction is “difficult to do on one’s own.” However, the trial court gave “some weight” to the appellant’s educational efforts by acknowledging her pursuit of a real estate license. The appellant admitted during testimony that she continued to use illegal drugs after her arrest. After reviewing the evidence presented to the trial court at the sentencing hearing, we determine that the trial court considered the necessary factors and that there was “substantial evidence” to support the trial court’s denial of judicial diversion. Cutshaw, 967 S.W.2d at 344; Parker, 932 S.W.2d at 958. This issue is without merit.

The appellant next complains that the trial court erred in denying full probation. Specifically, the appellant complains that the trial court “imposed the sentence without proper consideration of or deference to those principles set forth in the Sentencing Reform Act of 1989.” The appellant seems to complain primarily about the trial court’s emphasis on deterrence and the fact that the trial court failed to find that a sentence of confinement would specifically have a deterrent effect within the jurisdiction. The State disagrees, contending that the record supports the trial court’s sentencing determination.

In regards to alternative sentencing, Tennessee Code Annotated section 40-35-102(5) provides as follows:

In recognition that state prison capacities and the funds to build and maintain them are limited, convicted felons committing the most severe offenses, possessing criminal histories evincing a clear disregard for the laws and morals of society, and evincing failure of past efforts at rehabilitation shall be given first priority regarding sentencing involving incarceration.

A defendant who does not fall within this class of offenders “and who is an especially mitigated offender or standard offender convicted of a Class C, D or E felony is presumed to be a favorable candidate for alternative sentencing options in the absence of evidence to the contrary.” Tenn. Code Ann. § 40-35-102(6). Furthermore, unless sufficient evidence rebuts the presumption, the trial court must presume that a defendant sentenced to eight years or less is an offender for whom incarceration would result in successful rehabilitation. State v. Byrd, 861 S.W.2d 377, 379-80 (Tenn. Crim. App. 1993); see also Tenn. Code Ann. § 40-35-303(a).

The appellant herein pled guilty to manufacturing methamphetamine, a Class C felony, as a Range I offender. Because the defendant was convicted of a Class C felony and sentenced to fewer than eight years for the offense, the defendant was eligible for probation and was presumed to be a favorable candidate for alternative sentencing. See Tenn. Code Ann. §§ 40-35-102(6) & -303(a);

Byrd, 861 S.W.2d at 379-80. However, all offenders who meet the criteria are not entitled to relief; instead, sentencing issues must be determined by the facts and circumstances of each case. See State v. Taylor, 744 S.W.2d 919, 922 (Tenn. Crim. App. 1987) (citing State v. Moss, 727 S.W.2d 229, 235 (Tenn. 1986)). Even if a defendant is presumed to be a favorable candidate for alternative sentencing under Tennessee Code Annotated section 40-35-102(6), the statutory presumption of an alternative sentence may be overcome if:

- (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
- (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or
- (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant . . . .

Tenn. Code Ann. § 40-35-103(1)(A)-(C). In choosing among possible sentencing alternatives, the trial court should also consider Tennessee Code Annotated section 40-35-103(5), which states, in pertinent part, “[t]he potential or lack of potential for the rehabilitation or treatment of the defendant should be considered in determining the sentence alternative or length of a term to be imposed.” Tenn. Code Ann. § 40-35-103(5); State v. Dowdy, 894 S.W.2d 301, 305 (Tenn. Crim. App. 1994). The trial court may consider a defendant’s untruthfulness and lack of candor as they relate to the potential for rehabilitation. See State v. Nunley, 22 S.W.3d 282, 289 (Tenn. Crim. App. 1999); see also State v. Bunch, 646 S.W.2d 158, 160-61 (Tenn. 1983); State v. Zeolia, 928 S.W.2d 457, 463 (Tenn. Crim. App. 1996); State v. Williamson, 919 S.W.2d 69, 84 (Tenn. Crim. App. 1995); Dowdy, 894 S.W.2d at 305-06.

At the conclusion of the sentencing hearing, the trial court found no enhancement or mitigating factors applied in the appellant’s case. The trial court stated that it considered the presentence report, the prior criminal history and social history, then made the following findings at the conclusion of the sentencing hearing in regards to the grant of probation:

The Court is going to deny total probation. I think [the appellant] should serve a period of one hundred (100) days in the Warren County Jail. The balance of that three (3) year sentence will be on probation. I gave great consideration to whether or not confinement is particularly suited in these types of defendants, provided that others likely will commit similar offenses. We have a terrible problem in Tennessee, and especially in the midSouth dealing with this type of behavior, and it simply cannot continue without being punished. [Appellant], I hope you do well. As I said, you are intelligent. You will be able to get on with your life. If you have a desire, you will beat this problem. The defendant will be fined \$2,000.00. That will be payable to the appropriate law enforcement agency. She will also pay the costs. I do not feel that any other punishment is necessary in the way of public service or anything like that. All right.

Thus, the trial court noted the potential problems with rehabilitation and the desire to provide a deterrent to others in the community. At the hearing, the appellant herself acknowledged that she used illegal drugs long after her arrest. Further, Mr. Johns testified that there were significant problems with methamphetamine abuse in the Warren County area.

The appellant argues that State v. Smith, 735 S.W.2d 859, 864 (Tenn. Crim. App. 1987), requires there to be some evidence in the record that a sentence of confinement would have a deterrent effect within that jurisdiction. However, this requirement only applies “when deterrence considerations are the sole basis for imposing a sentence of confinement.” State v. Claud Simonton, No. W2004-02406-CCA-R3-CD, 2005 WL 2438395, at \*5 (Tenn. Crim. App., at Jackson, Oct. 3, 2005) (citing State v. Hooper, 29 S.W.3d 1, 10 (Tenn. 2000)). As stated above, the trial court did not base its decision to deny probation solely on the deterrent effect within the jurisdiction.

Based on the foregoing, we conclude that the appellant has failed to meet her burden of demonstrating that probation “will subserve the ends of justice and the best interest of both the public and the defendant.” State v. Dykes, 803 SW.2d 250, 259 (Tenn. Crim. App. 1990), overruled on other grounds by Hooper, 29 S.W.3d at 9-10. There is evidence in the record to support the trial court’s denial of total probation. This issue is without merit.

#### Conclusion

For the foregoing reasons, the judgment of the trial court is affirmed.

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JERRY L. SMITH, JUDGE